STATE OF MICHIGAN

COURT OF APPEALS

DARIO TOMEI,

Plaintiff-Appellant,

v

CAROL L. ZARNICK, SHEILA M. PLENTZ, LARRY FOLTZ, SUSAN FOLTZ, FRANK RYNICKI, and CHRISTINE RYNICKI,

Defendants-Appellees,

and

JOHN DOE,

Defendant.

UNPUBLISHED
March 15, 2005

No. 251574
Lenawee Circuit Court
LC No. 99-998300-CH

Before: Murray, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order denying plaintiff's motion for summary disposition, granting summary disposition in favor of defendants-appellees ("defendants"), and dismissing plaintiff's complaint. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

This is plaintiff's second appeal in this action to quiet title and enjoin defendants from constructing a dock or anchoring boats in front of his lakefront property, lot 25 on Sand Lake. In a prior appeal, this Court remanded for further proceedings after determining that the trial court erroneously applied the law of the case doctrine to determine that the action was governed by a judgment previously entered in 1980 in an action involving plaintiff's predecessor in title and certain backlot owners. See *Tomei v Zarnick*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2001 (Docket No. 223662). On remand, the trial court granted summary disposition in favor of defendants based on res judicata, but also indicated that the parties were collaterally estopped from relitigating the matter adjudicated in the prior action.

We review de novo the trial court's decision to grant summary disposition under MCR 2.116(C)(7). *Stoudemire v Stoudemire*, 248 Mich App 325, 332; 639 NW2d 274 (2001). The contents of plaintiff's complaint must be accepted as true unless contradicted by admissible,

documentary evidence submitted by the parties. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although we do not fully agree with the trial court's reasoning, we hold that plaintiff has not established any basis for disturbing the trial court's decision to grant defendants summary disposition.

Under Michigan's broad doctrine of res judicata, a second action is barred when (1) the first action was decided on the merits, (2) the matter in the second action was, or could have been, resolved in the first action, and (3) both actions involve the same parties or their privies. *Sewell v Clean Cut Management, Inc*, 463 Mich 569, 575; 621 NW2d 222 (2001). On appeal, plaintiff contends that the second and third elements were not satisfied. We disagree.

Limiting our review to the evidence submitted to the trial court and accepting plaintiff's allegations in the complaint as true, it is apparent that plaintiff sought to litigate the same issue as that in the first action, namely, whether the easement over lot 25 permitted the construction of a dock or anchoring of boats in front of lot 25. Indeed, the relief granted in the first action went beyond a mere determination that the easement at issue contemplated or allowed the construction of a dock and anchoring of boats. The 1980 judgment addressed the size of the dock, its placement, and how many watercraft could be moored at the dock. Because the subject of the present lawsuit was expressly litigated in the prior action, the second element for applying res judicata is satisfied.

Moreover, the circumstance involving plaintiff's construction of a house on lot 25 after the 1980 judgment was entered was not alleged in plaintiff's complaint and is given only cursory treatment on appeal; consequently, we need not address it. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). We note, however, that a trial court is empowered to modify a continuing injunction as circumstances require. *First Protestant Reformed Church v DeWolf*, 358 Mich 489, 493; 100 NW2d 254 (1960). But a party cannot unilaterally build rights by disregarding a trial court's injunctive order. *Troy v Holcomb*, 362 Mich 163, 169; 106 NW2d 762 (1961). If plaintiff believed that modification of the injunctive order was warranted to accommodate his housing plans, he should have moved for injunctive relief before building the house.

With regard to the third element of res judicata, plaintiff argues that a successor and predecessor in title to a property right lack the necessary privity to bar a claim under the doctrine of res judicata. We disagree.

"A privy includes one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase." *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 13; 672 NW2d 351 (2003). Hence, it follows that plaintiff, by virtue of his successive ownership of lot 25 through the plaintiffs in the first action, that defendants Frank and Christine Rynicki, by virtue of their successive ownership of lot 44 through the defendants in the first action, and that defendants Larry and Susan Foltz, by virtue of their successive ownership of lot 46 through the defendants in the first action, have the requisite privity for purposes of res judicata.

With regard to defendant Carol Zarnick, the alleged owner of lots 49 and 50, she apparently was a party to the first action under her former name, Carol Fittler, thereby establishing the requisite privity. Although plaintiff did not allege in his complaint that Carol

Zarnick was a party to the first action, he has not disputed defendants' claim in this regard. In any event, accepting the allegations in plaintiff's complaint as true, Zarnick was at least a successive owner of lots 49 and 50 through the defendants in the first action, Carol and Charles Fittler; therefore, the requisite privity is established.

A different analysis is warranted with respect to defendant Sheila Plentz, the owner of lots 47 and 48 because the evidence submitted to the trial court indicated that the owner of these lots was not a party to the first action. But plaintiff's failure to brief Plentz's specific circumstances preclude appellate review of this issue. *Silver Creek Twp, supra* at 99.

In any event, a mutual relationship to the same property right can establish the necessary privity to apply the doctrine of res judicata. *Wildfong v Fireman's Fund Ins Co,* 181 Mich App 110, 115; 448 NW2d 722 (1989). An easement does not give title to land; it constitutes an interest in the land. *Thies v Howland,* 424 Mich 282, 289 n 5; 380 NW2d 463 (1985). Because the easement rights for lots 47 and 48 were established by the same instrument underlying the easement rights for lots 46, 49, and 50, Plentz had the requisite privity for res judicata to apply.

Furthermore, even if Plentz were not a privy to other grantees and their successors in interest under the instrument, we would not reverse because the trial court reached the correct result in finding that collateral estoppel barred plaintiff's claim against Plentz. *Taylor v Laban,* 241 Mich App 449, 458; 616 NW2d 229 (2000). Unlike res judicata which bars the relitigation of claims based on the same transaction or events as the prior action, collateral estoppel precludes the relitigation of an issue in a subsequent or different lawsuit when the issue was actually and necessarily decided in the prior action. *Ditmore v Michalik,* 244 Mich App 569, 577; 625 NW2d 462 (2001). Because plaintiff's predecessor in title had a full and fair opportunity to litigate the matter raised in plaintiff's complaint regarding the dock and anchorage of boats and this issue was actually and necessary decided in the first action, Plentz could defensively assert collateral estoppel to bar plaintiff's claim. Mutuality of estoppel as between Plentz and plaintiff was not required. *Monat v State Farm Ins Co,* 469 Mich 679; 677 NW2d 843 (2004). Thus, the trial court reached the correct result with regard to each defendant when granting summary disposition under MCR 2.116(C)(7).

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Peter D. O'Connell